IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Magistrate Judge Boyd N. Boland

Civil Action No. 03-B-968 (BNB)
(Consolidated with Civil Action No. 04-B-613 (BNB))

CLAIRE LONG, and
ALLSTATE INSURANCE COMPANY,

Plaintiffs,

v.

UNITED STATES BRASS CORPORATION, a Texas corporation, and
DORMONT MANUFACTURING COMPANY,

Defendants.

ORDER

This matter is before me on **Plaintiff Long's Motion to Compel Defendant Dormont Manufacturing to Permit a Premises Inspection** (the "Motion to Compel"), filed July 7, 2004. I held a hearing on the Motion to Compel on July 26, 2004, and took the matter under advisement. On the record now before me, the Motion to Compel is DENIED.

Plaintiff Claire Long was burned in a propane gas explosion and house fire which occurred on March 3, 2001. Ms. Long was using a vacuum sweeper in a home where she was house-sitting. The vacuum apparently caused an electrical spark which ignited propane gas. The plaintiff alleges that the origin of the propane gas was a leaking flexible stainless steel connector which connected a propane heater to the gas outlet.

Dormont manufactured a component part of the stainless steel connector. Dormont

describes its part in the manufacturing process as follows:

> In 2000 Dormont was approached by US Brass to . . . provide "nut x nut" connectors (the "Components"), in various sizes, which product US Brass intended to incorporate in its manufacture of a gas connector (the "Connector") which would then be marketed and sold bearing the US Brass name/logo. After receiving the Components from Dormont, US Brass manufactured the product, i.e., the Connector. US Brass received the Components into its Commerce, Texas, facility, inspected them, attached end fittings, coiled the tubing on its own machines, and placed a US Brass warning tag . . . on the final product, i.e., the Connector. US Brass manufactured the end fittings, as well as flexible brass tubing for other types of gas connectors. . . . US Brass then placed the coiled Connector into a poly-bag package and distributed it to Ace Hardware, among others. It is alleged (a fact that is in dispute) that Ace Hardware then sold the Connector to a repairman, who ultimately installed it in the residence where Plaintiff was visiting.

Defendant Dormont Manufacturing Company's Brief In Opposition (the "Response"), filed July 22, 2004, at pp.5-6 (internal citations omitted).

Dormont's efforts to distance itself from the product notwithstanding, it is clear that Ms. Long alleges as one theory of her case that the component part admittedly manufactured by Dormont–the "nut x nut" connector–was defective and caused the gas leak which led to the explosion.

According to Ms. Long, Dormont "annealed, rolled, welded and corrugated the stainless steel tubes" that comprise a part of the "nut x nut" connector. Motion to Compel, at p.2. Ms. Long alleges that a defect occurred as follows:

> [T]he flex connector sustained a dent or flaw in the manufacturing process that weakened the tube and allowed fractures to occur in the metal. Plaintiffs seek to prove that one or more steps of the manufacturing process is capable of denting or damaging tubes. It is necessary for Plaintiffs to examine, among other processes, how the tube is handled, how the feeder mechanism works and whether there is the potential for causing such damage in the manufacturing process. The inspection will help Plaintiffs determine if a bulge or dent could occur in the connector.

Plaintiff Long's Reply In Support of Her Motion to Compel (the "Reply"), filed July 26, 2004, at p.6. Ms. Long seeks an order compelling Dormont to submit its Pittsburgh manufacturing plant to an inspection so that the parties' counsel and experts may "view, among other items, the annealing, rolling, welding and corrugating processes during which it is suspected the alleged defect was introduced into the product." Motion to Compel, at p.2. Ms. Long also requests an order allowing her to photograph and/or videograph the inspection.

It is significant that the Motion to Compel is supported by argument only. There is no evidentiary support whatsoever for the claimed defect or Ms. Long's bulge or dent theory. To the contrary, Ms. Long concedes in her Reply that she has not yet endorsed any experts and that she has developed a "working theory" only "which has not been reduced to opinion form." Reply, at p.6.

By contrast, and in its response in opposition to the Motion to Compel, Dormont has submitted the affidavit of its president, Evan J. Segal, which establishes the following:

(1) "The design, manufacture and testing of gas connectors involve highly confidential, proprietary and trade secrets and the equipment used in the manufacturing process are proprietary." Evan Segal's Affidavit (the "Segal Aff."), attached as Exhibit A to the Response, at ¶13.

(2) "Dormont has never allowed a complete inspection of its [manufacturing] facility." Id.

(3) "The current trade secret procedures and technology used at the Pittsburgh plant are at the heart of Dormont's business in a highly competitive industry. Dormont has taken great steps to protect these proprietary trade secrets, a clear recognition that the survival of the company is in part based on this technology." In addition, "[e]very employee must sign a non-disclosure and non-compete clause and those requirements are strictly enforced by Dormont." Id., at ¶¶30-31.

(4) "Most of the complex pieces of gas connector processing equipment . . . were designed by Dormont and are proprietary to the company. Many of the processes involved are so secret that they are not patented for fear of revelation. The manufacturing processes and equipment used are closely guarded by Dormont.

Only authorized personnel, under a strict confidentiality agreement, are permitted inside the manufacturing facility, and even their access is restricted to certain limited portions of the plant." Id. at ¶27.

(5) "Dormont does not allow photographs to be taken in its plant, and does not allow anyone complete access to the manufacturing process or the equipment, and no one has photographed the manufacturing processes." Id., at ¶15.

(6) "The manufacturing equipment and processes in the plant has [sic] been modified since the nut x nut component which is at issue was produced. The current equipment is not illustrative of the equipment which was used at the time of the manufacture of the subject connector." In addition, "Dormont's gas connector technology and methodology is an evolutionary process incorporating new technological advances and equipment as they are internally developed. In keeping with this evolutionary process, the manufacturing equipment in the Pittsburgh plant constantly has undergone changes. As a result, many aspects of the manufacturing process used at Pittsburgh today have changed from those used in the manufacture of the subject connector. These include process improvements, tooling enhancements and new equipment. . . . Substantial differences exist when comparing the equipment and procedures used in 2000 and today. An inspection of the Pittsburgh plant today would not be of any assistance in determining whether the subject component of the U.S. Brass gas connector was properly manufactured." Id., at ¶¶20 and 26.

(7) "The subject component of the U.S. Brass gas connector was manufactured four years ago and substantial changes have been made since then. The nut x nut component for U.S. Brass currently is not manufactured at the Pittsburgh plant." Id., at ¶25.

(8) Finally, Dormont "would have to cease its operations for the day of any inspection. To cease operations for a day would result in a significant economic loss to Dormont. It is estimated that not operating its plant for a day, would result in the loss of in excess of $100,000 to Dormont. Further, Dormont would have to take remedial steps to cover the equipment not involved in the manufacture of the subject connector. . . . Id., at ¶18.

An entry upon land is governed by Rule 34(a), Fed. R. Civ. P., which provides:

> Any party may serve on any other party a request . . . (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

The rule permits the "observation of machinery, work practices, or manufacturing operations on a party's premises." Jay E. Grenig and Jeffrey S. Kinsler, Handbook of Federal Civil Discovery and Disclosure, §9.22 (2d ed.).

The right of a party under Rule 34 to enter upon designated land, inspect an operation thereon, and photograph is not unlimited. See Micro Chemical, Inc. v. Lextron, Inc., 193 F.R.D. 667, 669 (D. Colo. 2000). To the contrary, Rule 26(b) limits discovery under Rule 34 and otherwise to those matters, not privileged, which are relevant to the subject matter involved in the case and that information that appears reasonably calculated to lead to the discovery of admissible evidence. Rule 26(c)(7), Fed. R. Civ. P., further directs that a court may, for good cause shown, enter an order preventing discovery where necessary to protect a party from annoyance, oppression, undue burden or expense, and to protect trade secrets and other confidential information.

In this case, the unrefuted affidavit of Dormont's president establishes that the inspection of Dormont's plant would result in the disclosure of its trade secrets and confidential information; that the requested inspection is irrelevant to the facts and issues in this case because of changes to Dormont's plant since the product at issue was manufactured four years ago; and that the inspection would result in undue burden and expense because Dormont would have to shut down production on the day of the inspection and cover other machinery contained in its plant.

The Tenth Circuit Court of Appeals has established the procedure to be applied under these circumstances. In Centurion Industries, Inc. v. Warren Steurer and Associates, 665 F.2d 323,325-26 (10th Cir. 1981), the circuit court held:

> There is no absolute privilege for trade secrets and similar

> confidential information. To resist discovery under Rule 26(c)(7), a person must first establish that the information sought is a trade secret and then demonstrate that its disclosure might be harmful. If these requirements are met, the burden shifts to the party seeking discovery to establish that the disclosure of trade secrets is relevant and necessary to the action. The district court must balance the need for the trade secrets against the claim of injury resulting from disclosure. If proof of relevancy or need is not established, discovery should be denied. On the other hand, if relevancy and need are shown, the trade secrets should be disclosed, unless they are privileged or the [requests] are unreasonable, oppressive, annoying, or embarrassing.

Mr. Segal's affidavit satisfies Dormont's burden of establishing that the equipment and processes of its plant are trade secrets. That information is maintained as confidential, and Dormont exercises diligence to maintain the confidential nature of its equipment and processes. The arguments of Ms. Long that Dormont's failure to obtain patents for its equipment and processes indicates that they are not trade secrets is unpersuasive. Some trade secrets, like the Coca Cola formula, are so valuable and are capable of being maintained confidentially so as to justify their not being patented.

Ms. Long has failed to establish that the inspection is relevant and necessary to the action. First, Mr. Segal's affidavit establishes that the equipment and manufacturing process for stainless steel nut x nut connectors has changed in the four years since the connector in question was manufactured. It also establishes that the nut x nut connector is no longer manufactured at the Pittsburgh plant which Ms. Long seeks to inspect. In addition, I am not persuaded that it is appropriate to put at risk Dormont's trade secrets and put Dormont to considerable expense (estimated at more than $100,000) to allow Ms. Long to test her "working theory" that "one or more steps of the manufacturing process *is capable of denting or damaging tubes*," particularly in the absence of any expert opinion that the alleged flaw in the product was caused by a dent or

bulge in the manufacturing process. More than the argument of counsel in support of a "working theory" is necessary to justify the substantial intrusions and burdens involved here. See Micro Chemical, 193 F.R.D. at 669 (noting that "the degree to which a proposed inspection will aid in the search for truth must be balanced against the burdens and dangers created by the inspection. . . . In the recent more liberalized trend in granting inspection orders, the courts have uniformly scrutinized the problems to insure that the anticipated benefits are real and necessary, and that the burdens will not be intolerable")(quoting Belcher v. Bassett Furniture Industries, Inc., 588 F.2d 904, 908 (4th Cir. 1978)).

On balance, I find under the facts of this case as they are now presented to me that Ms. Long's need for the requested entry and inspection is substantially outweighed by the potential harm and burden to Dormont.

IT IS ORDERED that the Motion to Compel is DENIED.

Dated August 2, 2004.

BY THE COURT:

Magistrate Judge Boyd N. Boland